

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: July 13, 2001

Case No.: **1998-INA-200**
CO No.: **P95-CA-39937**

In the Matter of:

SAM & RIVKA LEVINGER,
Employer,

on behalf of:

ELSA GONZALEZ-BAEZA,
Alien.

Appearance: Moshe A. Young, Esquire
for Employer and Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Vittone, Burke and Wood
Administrative Law Judges

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from an application for labor certification on behalf of Alien Elsa Gonzalez-Baeza ("Alien") filed by Sam and Rivka Levinger ("Employer") pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, San Francisco, California, denied the application, and the Employer and the Alien requested review pursuant to 20 C.F.R. § 656.26.

Statement of the Case

On August 29, 1994, Employer filed an Application For Labor Certification to fill the position of "Domestic Cook." The duties were described as:

Plan Menus, prepare and cooks health[y], low fat meals for family including 2 parents and 3 children ages 13, 12, and 5 ½, as well as for regular business or social entertaining. Order foodstuffs [*sic*], bake breads, pastries. Perform seasonal cooking. Prepare variety of fancy dishes for [entertaining]. Serve meals. Clean kitchen/utensils.

Will be working Monday, Tuesday, Thursday, Friday, and Sunday.

(AF 13, 59). Employer required two years of experience in the job offered. *Id.*

The CO issued a Notice of Findings (“NOF”) on December 20, 1996 stating his intent to deny the application. (AF 36-38). The CO found that there was no job opening and that the job was apparently created for the Alien. The CO stated that “There is some question whether you: have a current job opening, operate an on-going business, and/or can provide permanent full-time employment to which U.S. workers can be referred.” (AF 37) Employer was ordered to submit rebuttal demonstrating their ability to provide permanent, full-time employment. *Id.* Next, the CO found that there was no *bona fide* job opportunity as the position was created for the Alien. Employer was told that they could submit documentation demonstrating that the job existed previously at the same requirements or submit documentation showing a change in the business which caused the creation of the position. As the Alien was already employed by Employer, the CO stated that “[t]his change in business operation must not be related to the work presently performed by the alien.” (AF 36).

Employer submitted their rebuttal on February 13, 1997. (AF 41-56). As to the full time employment question, Employer stated that they both are employed, and that the husband owns his own business. Employer submitted financial statements for the company, attempting to demonstrate an ability to pay the salary. Employer submitted a schedule, stating that the Alien would be preparing 21 meals a week for a family of five. Further, Employer submitted an entertainment schedule. Employer stated that they are a Kosher family, submitting a letter from their Rabbi to that effect. (AF 41) Employer has guests over every Friday after temple services, and often has guests over after Saturday services. Further, the family celebrates all Jewish holidays at home with invited guests. Sometimes, Employer may have as many as twenty people over for these meals, such as for Jewish New Year or Passover. The entertainment schedule submitted listed approximately 50 dates for when such meals may be held. (AF 54-55).

As for the finding that there was no *bona fide* job, Employer alleged that a change had occurred that necessitated the hiring of a full-time cook. First, Employer’s youngest son suffered a stroke during birth, which resulted in paralysis of the right side of his body. He thus requires a special diet. Further, Employer eats only Kosher food, strictly prepared according to the Kashruth. This makes it difficult for the family to eat out. Finally, Ms. Levinger has returned to work. She previously performed all of the cooking duties. Her duties as a nurse, combined with the special needs of Employer’s son and the inability to find suitable food at restaurants, has led to

the need for a domestic cook. (AF 53)

On June 19, 1997, the CO issued a Supplementary Notice of Findings (“SNOF”). (AF 63-65). In the SNOF, the CO again stated his intent to deny the application. The CO stated that the rebuttal actually increased the job duties by discussing the fact that the family needed Kosher cooking. Further, the CO stated that Employer had not responded to the finding that the Alien had previously only worked part-time as a cook with the household. The CO also found that the household situation had not changed since the Alien started as a general housekeeper after Ms. Levinger returned to work. The CO concluded by stating “Corrective actions stated in the NOF have not yet been complied with.”

Employer responded to the SNOF on July 2, 1997. (AF 59-62). First, Employer noted that the NOF had not asked Employer to address the fact that the Alien had only worked part-time as a cook previously. However, Employer went on to state that Alien had always worked full-time, with other light household chores only taking up ten percent of her time. This situation changed once Ms. Levinger returned to work as previously described. Further, Employer now has a cleaning crew coming to the house twice a week. Employer stated that the Alien no longer performs these light household duties and that the Alien was never hired as a general housekeeper. As for the alleged addition of a Kosher cooking requirement, Employer replied that Kosher cooking was not a requirement, but merely discussed as a means of demonstrating their need for a cook. Specifically, such cooking requires a longer preparation time, demonstrating the full-time employment aspect, and limits the family’s ability to eat out, demonstrating the need for such an employee.

On October 31, 1997, the CO issued his Final Determination (“FD”) denying the application. (AF 70-71). According to the CO, the evidence with the rebuttals “convinces us that you are attempting to create a full-time job specifically for the alien as a convenience rather than out of necessity.” (AF 70) Therefore, the application was denied.

Employer requested review of this decision on November 17, 1997. The file was forwarded to the Board on April 29, 1998. As the appeal involved a domestic cook, the file was held pending resolution of an *en banc* decision which involved similar issues. Unfortunately, the file was misplaced at that time. After several attempts to locate the file, the Board issued an *Order Reconstructing File*. In response, Employer submitted all documentation they had received or sent in this matter. The CO has not objected to Employer's representation of the documentation that constitutes the appeal file, and it appears to be complete on its face. Accordingly, Employer's reconstructed file will be considered as the Appeal File in this matter. We have renumbered the pages to include both the record made before the CO and the post-hearing request filings.

Discussion

In *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*), the Board held that a Certifying Officer (CO) may properly invoke the *bona fide* job opportunity analysis authorized by 20 C.F.R. § 656.20(c)(8) if the CO suspects that the application misrepresents the position offered as skilled rather than unskilled labor in order to avoid the numerical limitation on visas for unskilled labor. In *Uy*, the Board held that the first step in considering whether employer is offering a *bona fide* job opportunity is to examine the totality of the circumstances – relevant circumstances include:

- the percentage of the employer's disposable income that will be devoted to paying the cook's salary
- whether the employee will be engaged in cooking duties for a substantial portion of the day.
- whether the employee will be required to perform functions such as child care, general cleaning, or other non-cooking functions (and if not, how the employer accomplishes those functions)
- whether the employer employs other domestic workers
- whether the employer has retained domestic cooks in the past, and if not, what circumstances prompted the instant job offer
- the extent of the alien's training and experience as a cook, and whether such training or experience involved cooking in a domestic situation
- general indicia of the employer's credibility or lack thereof, such as the employer's level of compliance and good faith in the processing of the application
- general indicia of the position possibly being used to promote immigration
- Any special circumstances of the household (e.g., nutritional requirements which would be most credible if supported by independent documentation such as a physician's statement supported by objective documentation)

The second step under *Uy* is to consider what those circumstances say about the *bona fide* nature of the job opportunity. The Board held that a CO should consider such factors as whether an employer has the motive to mis-describe the position, indicators for believing or doubting the employer's veracity or the accuracy of his or her assertions, and whether independent documentation supports the employer's assertions.

In the record presented for review, Employer clearly has sufficient income to pay for a cook. Both Mr. and Mrs. Levinger work outside the home. They have three children. Employer has described an entertainment and other work schedule sufficient to reasonably describe substantial cooking duties, and Mr. Levinger has businesses interests that are promoted by entertaining guests with meals in the home. Employer maintains that, although the Alien at one time spent about 10% of her day doing incidental housekeeping duties, under the redesigned job she will be working solely as a cook. To support this assertion, Employer proffered that they have employed a cleaning service for several years. Alien's background prior to employment by Employer shows five years of employment as a "self-employed housekeeper, babysitter and domestic cook" and about two years as a domestic cook. Employer advertised the position in compliance with the regulations, and received only one response. That applicant withdrew her application on the ground that she had found another job. Employer stated that they made an unsuccessful effort prior to filing the labor certification application to locate a qualified and available U.S. worker, asking extensively among friends and business associates. (AF 14)

Employer stated that they became associated with the Alien through a friend. (AF 14) There is no reason from the record presented to suspect that the cooking position was created solely to promote the Alien's immigration to the United States.

The record contains a statement from a physician from the Department of Pediatrics at Kaiser Permanente in Southern California, stating that two of Employer's children have lactose intolerance – a condition that "necessitates a specialized diet and person in charge of cooking who clearly understands this." The physician stated that he had been informed that Mrs. Levinger likewise has lactose intolerance. (AF 40) The statement from Employer's Rabbi establishes that they are Orthodox Jews who eat only Kosher food and "all their meals are prepared at home according to strict Jewish dietary laws. They do not eat out." (AF 41)¹ The Rabbi also confirmed based on personal knowledge that all three children "have special physical needs and must be restricted to a special diet." (AF 41) Employer asserted that their youngest son is paralyzed in the right side of his body and needs a special diet catering to his physical needs. (AF 53)

When considering the *bona fide* nature of a domestic position based on a paper record, it will often be difficult to obtain a clear picture of a household. In *Uy*, we clearly expressed doubts that most households could afford the luxury of employing a domestic service worker to do nothing but cook, whereas there is a clear motive to mis-characterize housekeeper positions as cooks in order to avoid the numerical limitation on unskilled positions. In the instant case, not all factors resound to Employer's favor. Nonetheless, the CO's underlying premise that it was improper for Employer to create the job "as a convenience rather than out of necessity" is wrong. In a domestic situation, most jobs are created as a convenience rather than out of an absolute

¹We agree with Employer that the CO drew the wrong conclusion from Employer's description of the need for Kosher cooking. Employer did not present this information as a job requirement but rather as evidence to bolster the *bona fide* need for a cook.

necessity. As we held in *Marion Graham*, 1988-INA-102 (Mar. 14, 1990) (*en banc*), the relevant business for purposes of applying the business necessity test in the domestic context is the "business" of running a household or managing one's personal affairs. Similarly, when viewing the *bona fides* of a position under the totality of the circumstances test of section 656.20(c)(8), the standard is not whether the household would cease to function without a cook, but whether Employer is offering a *bona fide* job as a cook. Moreover, this record does not demonstrate that the cook position was created solely for the benefit of the Alien.

Thus, we find that the record presented by Employer was sufficient to establish that they are offering a *bona fide* job opportunity for a cook in their household. Employer has presented evidence of sufficient financial means to support a cooking position -- and evidence of several reasons supporting the need for cooking duties to be performed in the household including business and social entertaining, and special diets of family members. Moreover, Employer's case is adequately supported by independent documentation. Based on the precise circumstances of this particular case, we find that Employer successfully rebutted the CO's citation of a violation of section 656.20(c)(8).

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED** and the matter **REMANDED** for the issuance of a labor certification.

Entered by:

JOHN M. VITTON

Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400**

Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.